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CASE NO: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Robert B. Eubank, Petitioner,
Individually and on Behalf of All Other
Shareholders of Lee Lumber Company, Ltd.,

vs.

Lee Lumber Company, Ltd., Respondent

vs.

International Paper Company, Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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134 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals may affirm a District Court judgment of dismissal that made no findings of fact, on the grounds that the findings of fact below were not clearly erroneous.

2. Whether a Court of Appeals may affirm a judgment without opinion, unpublished, and with no indication of its grounds for affirmance.

3. Whether a Court of Appeals may affirm a judgment in contravention of its Local Rules.

4. Whether a summary judgment dismissing a prior suit for prescription of one cause of action bars a later suit stating a different unprescribed cause of action, where the prior suit claimed to state the unprescribed cause of action.

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Ltd.,

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International Paper Company, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Robert B. Eubank respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this

proceeding.

OPINIONS BELOW

The opinions below are unpublished. The opinion and judgment of the District Court are reproduced at Appendix, pp. C-1; the judgment of the Court of Appeals for the Fifth Circuit, at Appendix, p. D-1; its order on petition for rehearing, at Appendix, p. E-1.

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered October 27, 1983 by the Court of Appeals for the Fifth Circuit. A petition for rehearing and suggestion for rehearing en banc were denied November 28, 1983. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States,

Amendment V

Constitution of the United States, Amendment XIV

28 United States Code 2072

Federal Rules of Civil Procedure, Rules 12(b), 56(c)

Federal Rules of Appellate Procedure, Rule 34(a)

Local Rules 47.6 and (Former) 21, Court of Appeals for the Fifth Circuit

Louisiana Civil Code, Arts. 2034, 2221, 2464, 3456, 3542

Louisiana Code of Civil Procedure, Arts. 3655, 3657-3662

Pursuant to United States Supreme Court Rule 21(f), the above are set out verbatim in the Appendix, beginning at page G-1.

STATEMENT OF THE CASE

The issue below was res judicata. The District Court dismissed the present

suit, the third ("Lee III") of four arising from the same facts. The grounds were that Lee III was barred by a summary judgment dismissing the second ("Lee II") of the four suits. The statement of the case includes both the facts which gave rise to the litigation, and the history of prior litigation held to be res judicata to the present.

The Facts Underlying The Litigation

The Lease. Lee Lumber Company, Ltd. ("Lee") owned in 1946, and owns today, some 18,000 acres in central Louisiana (the "Property"). Several decades before 1946, Lee had conducted a timber-cutting and sawmill business. It had cut all timber from the Property and been thereafter inactive. Over the decades the timber stand grew back. Lee's subsequent shareholders and management were not engaged in its former business.

In 1946, in two separate written contracts, International Paper Company ("International") bought the standing timber on the Property (the "Timber Sale") and leased the Property for some 60 years ending in 2006 (the "Lease"). International recorded the Lease and commenced operations on the Property, continuing to this date.

The Consideration. The Lease provided rent of $1,400.00 per year, about 7.7¢ per acre. A 1950 amendment to the Lease increased the rent to equal, each year, the ad valorem taxes paid by Lee on the Property during the previous year. International reserved the right to cancel the Lease in whole or in part at any time.

The Timber Sale stated a price of $150,000.00 for the standing timber, or about $8.33 per acre, subject to

reduction on various conditions.

The Lease acknowledged the Timber Sale. It noted however that its own agreed "primary purpose" was the growing of forest products in the future and that

> "the consideration paid herefor covers all such rights and privileges as herein provided." Lease, p. 9 at Record, p. 76.9.

History Of The Litigation

The Contentions That The Lease Is Void. While the merits were never reached below and are not at issue here, a brief discussion of them may help in putting the entire case in perspective. First Lee, then petitioner, have contended for some 10 years that the Lease is void. The contentions are two:

(1) that under Louisiana law the rent or consideration was not "serious," was "out of all proportion" to the value of

the Lease, La.C.C. Art. 2464; [1] **Murray v. Barnhart**, 42 So. 489 (La. 1906); **Northeast Louisiana Detachment of Marines v. Monroe**, 253 So.2d 107 (La.App.1971); **L.L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc.**, U.S.D.C., W.D.La. No. 14680 (12/11/71),[2] 480 F.2d 923 (5th Cir. 1972); and

(2) that International's right to cancel also subjected that consideration to a "potestative condition" rendering a contract void under Louisiana Law, La.C.C. Art. 2034,[3] **Murray** (supra), and other cases.

In the same Circuit and District Court below **L.L. Brewton Lumber Co.** (supra)

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1 Appendix, p. G-12.

2 Appendix, p. F-1.

3 Appendix, p. G-11.

cancelled successive options (totalling 99 years) to renew a timber lease, because the rent was payment of ad valorem taxes. It noted that whether such rent supported a valid lease was the issue; that Louisiana law required a serious consideration for a contract to be valid; that property tax reimbursements by definition leave no conceivable profit to the lessor (since the lessor has already incurred a like expense); and that this would not be sufficient consideration "even if there were no timber on the property and the land were bare. The opinion concluded:

> "Under no conditions can rent, consisting solely of the reimbursement of taxes, be considered serious consideration as contemplated by Louisiana law." **L.L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc.**, U.S.D.C., W.D.La., No. 14680, affirmed 480 F.2d 923, Appendix, p. F-8.

Lee I - Dismissal - Prescription. Lee

brought the first suit ("Lee I") in the Louisiana courts, naming no particular cause of action. Lee asserted the present contentions that the Lease is void, and as well that International had failed to pay the full rent.

The state district court dismissed, holding the suit to be an "action of nullity or rescission," prescribed under La.C.C. Arts. 2221 and 3542.[4] The state appellate court affirmed insofar as the present contentions were concerned but remanded for trial the issue, whether International had breached its obligations **Lee Lumber Co., Ltd. v. International Paper Co.**, 321 So.2d 42 (La.App.1975).

Lee filed an interlocutory petition for certiorari. The state supreme court denied writs, reserving Lee's rights pending disposition of the remand. Lee

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[4] Appendix, pp. G-11, G-13.

Lumber Co., Ltd. v. International Paper Co., 324 So.2d 423 (La.1976).[5]

The state district court on remand found that International had breached the Lease every year, but held Lee estopped from cancelling. The state appellate court affirmed. **Lee Lumber Co., Ltd. v. International Paper Co.**, 345 So.2d 212 (La.App.1977).[6]

Now Lee petitioned for certiorari on all issues. The Louisiana Supreme Court denied certiorari, with dicta that "because the facts relied on by the court of appeal show serious consideration, the

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[5] Dixon, J., dissented, "being of the opinion the lease might be null, having been contracted on a potestative condition," 324 So.2d 423, 424.

[6] In so doing, it noted that from 1950 to 1971 International reimbursed taxes to Lee of $105,814.00, averaging $4,809.00 per year - an observation that was later to influence the course of the litigation.

result is correct."[7] Thus Lee I never reached the question, whether the Lease is void.

Lee II - Summary Judgment - Prescription. Lee, having meanwhile learned of the District Court's and Fifth Circuit's holding in **L.L. Brewton Lumber** Co. (supra), filed suit in District Court ("Lee II"). Lee II described itself as an action for a declaratory judgment, reciting several specific underlying causes of action, including the "possessory action." The object was, to present unprescribed causes of action other than that of "nullity or

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[7] **Lee Lumber Co., Ltd. v. International Paper Co.**, 347 So.2d 503 (La.1977). Inter alia, Tate, J., dissented, noting that serious consideration had never been passed upon below, and that the prescription issue was incorrectly decided below. The consideration noted by the court of appeal works out to 27¢/acre/year - and is also by definition a reimbursement of expense.

rescission." International moved for summary judgment, on the grounds of prescription of the "action of nullity or rescission" and of res judicata. The District Court granted summary judgment for prescription, not res judicata. Its opinion,[8] unpublished, noted that the reference to other underlying causes of action "does not present any obstacle," because "we consider the basic action underlying plaintiff's action for declaratory judgment to be that of nullity or rescission." [9]

On appeal the Fifth Circuit required oral argument, but affirmed,[10] without opinion, unpublished, with reference to

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[8] Appendix, p. A-1.

[9] Appendix, p. A-17.

[10] Appendix, p. B-1.

Local Rule 47.6 (then 21).[11] That rule provides in pertinent part for affirmances without opinion where "the dispositive issue" is whether the "judgment of the District Court is based on findings of fact which are not clearly erroneous."

Lee III - Dismissal - Res Judicata. Petitioner, a shareholder of Lee and an attorney, felt that as a matter of law the outcome of Lee I and Lee II was inconclusive. He requested Lee to file a possessory action, strictly drafted and confined to such, to again attempt to avoid the Lease. Lee's officers and directors, discouraged by the time and money already spent and the very inconclusiveness, refused. Petitioner then filed the instant civil action ("Lee

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[11] Appendix, p. G-8.

III"), as a shareholder's derivative suit to compel the assertion by Lee of a "possessory action" against International.[12] International filed a motion to dismiss for failure to state a claim (which the District Court treated as a motion for summary judgment), on the grounds that Lee II was res judicata to Lee III. Petitioner argued to the contrary, because the two causes of action ("action of nullity or rescission," and "possessory action") were distinct, and himself moved for summary judgment. The District Court itself raised for International the

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[12] The Louisiana "possessory action" is most quickly, if not perfectly, grasped by analogy to the old common-law cause of action, "forcible detainer." It is a legal convention by which a prior possessor of any property can compel a present possessor to justify that present possession, or surrender it. La.C.C.P. Arts. 3655, 3657-3662, Appendix, pp. G-14 - G-20

defense of prescription of the possessory action, by minute entry inviting additional briefing from International on this point. Nevertheless the District Court, again in an unpublished opinion,[13] held that (1) the possessory action was stated and had not prescribed[14], but (2) Lee II was res judicata to Lee III because Lee II had resulted in a "valid lease" which was "no longer subject to

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[13] Appendix, p. C-1.

[14] Appendix, p. C-11, n. 11.

attack."[15]

The Fifth Circuit again required oral argument, but again affirmed, again unpublished and again without opinion, again with reference to Local Rule 47.6 - again ostensibly holding that the dispositive issue was whether the District Court's findings of fact were "clearly erroneous," and that they were not.[16] The Fifth Circuit denied a petition for rehearing and suggestion of

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[15] Appendix, p. C-6. The District Court never used the phrase, "res judicata." It quoted **Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate**, 38 So. 932 (La.1905), for the proposition that to assert a possessory action a lessee under a void lease must show that the lease is void on its face. The quotation came from an initial opinion that was reversed on that precise point, on immediate rehearing, though the decree remained the same for other reasons. 38 So. 932, 935 ff. The District Court then reached the conclusion that Lee II resulted in a "valid lease," precluding a possessory action - i.e., res judicata.

[16] Appendix, p. D-1.

rehearing en banc.[17] Petitioner filed the present petition for certiorari.

Lee IV. Petitioner, upon filing the Lee III petition for rehearing, also filed another shareholder's derivative action, in the same District Court ("Lee IV"). Lee IV seeks to compel the assertion of an "action to quiet title" by Lee against International, to obtain a cancellation of the Lease and thus avoid the balance of its term, 1983-2006.[18]

Basis for Federal Jurisdiction Below. The basis for federal jurisdiction in the District Court below is diversity of citizenship and amount in controversy, under 28 U.S.C.A. §1332.

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[17] Appendix, p. E-1.

[18] The Lee IV cause of action was selected to avoid further confusion over the reversal of **Houssiere Latreille** on rehearing. Supra, n. 15.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Affirmance on Issue Not Present Below.

An appropriate Fifth Circuit Local Rule 47.6 "Affirmance without Opinion," itself has the effect of an opinion. It does not obscure its grounds, but specifies them. Local Rule 47.6 (formerly 21, but here usually referred to by its present citation) provides for such affirmances when one or more of the following circumstances exists and "is dispositive:"

(1) Judgment below was based on findings of fact which are not clearly erroneous;

(2) The evidence in support of a jury verdict was not insufficient; or

(3) The order of an agency was supported by substantial evidence.

Where the Fifth Circuit has determined

that one of the above three issues is "dispositive", if it "also" determines that no error of law appears and an opinion would have no precedential value, the judgment below may be affirmed without opinion.

Petitioner takes no issue with Local Rule 47.6 itself, but with its application below. The Fifth Circuit inaugurated Rule 47.6 upon its first use, with a lengthy explanatory opinion in **N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, Local 990**, 430 F.2d 966 (5th Cir. 1970). The Rule was a response of the Court to an explosive increase in the amount of its judicial business. The opinion found the three issues "closely akin" and involving the "same considerations," and concluded that a further opinion thereon "really serves no useful purpose." 430 F.2d 966, 971.

Petitioner would agree. Reversals on the absence of support in the record for findings of fact are rare, and rarely deserved. Such appeals are typically a waste of time of bar and bench.

In the present case the Fifth Circuit misapplied the Rule. The District Court judgment granted a motion to dismiss for failure to state a claim, under Rule 12(b)(6), FRCP.[19] International, the defendant, never had to file an answer, and never joined issue as to any facts. There were no findings of fact, not by the trial judge, a jury or an administrative agency. The District Court treated the motion as one for summary judgment under Rule 56, FRCP. Rule 56(c) provides that summary judgment shall be rendered if "there is no genuine issue as

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[19] Appendix, p. G-3.

to any material fact" and "the moving party is entitled to a judgment as a matter of law."[20] As in the case of a Rule 12(b)(6) motion, the District Court in ruling on a Rule 56 motion makes no findings of fact. Nor did petitioner or International, on appeal, raise any issue as to the correctness of any "findings of fact."

Might the mere absence of factual issues justify affirmance without opinion under Rule 47.6, if there was no error of law? It seems not. Such an interpretation would subject almost every appeal to the rule, since all affirmances find (usually) no error of law or (more rarely) error but a correct result for other reasons. In **N.L.R.B.** the Fifth Circuit noted both the possibility of the

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[20] Appendix, p. G-6.

rule's misuse, and its narrow intended application:

> "The Court recognizes that it must - the word is must - never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used.
>
> "The Court itself must be vigilant. We believe we are sensitive now to the factors which would make application of the Rule wrong or unwise or inappropriate. It is the Court's purpose to heed them and in our own survival assure survival of the system we cherish." 430 F.2d 966, 972-973

In an exercise of this vigilance, the Fifth Circuit in 1978 amended Local Rule 47.6 to bring it to its present form. Until then merely "that no error of law appears" was an alternative circumstance alone justifying affirmance under the Rule. Former Local Rule 21.[21] The 1978

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[21] Appendix, p. G-10.

amendment reduced the alternative circumstances to the first three.[22] This was consistent with the N.L.R.B. opinion itself, which dwells upon the first three issues at great length and merely touches upon the original but now deleted fourth. The initial phrasing of the rule may itself have been a mistake.

2. Affirmance With No Indication of Grounds.

The Fifth Circuit may have used Local Rule 47.6 as a vehicle to affirm without coming to grips with the case or the grounds.

If so, recent authorities indicate this also would fall below the accepted and usual course of judicial proceedings. In

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[22] And pointedly so. See the Fifth Circuit's marked copy of former Rule 21, from which the present Rule 47.6 was produced in 1978, furnished as a courtesy by the Fifth Circuit. Appendix, p. G-9.

Taylor v. McKeithen, 407 U.S. 191, 32 L.Ed.2d 648, 92 S.Ct. 1980 (1972), this Court vacated and remanded a legislative reapportionment suit to the Fifth Circuit because the record was not fully informative as to the reasoning of the Court of Appeals. The Fifth Circuit, in that case, had reversed the District Court without opinion and adopted an alternative reapportionment scheme previously advanced below. Both the majority and the three dissenting justices noted with approval Local Rule 47.6 (then Local Rule 21). The majority however remanded because of the need otherwise to "impute" reasoning to the Court of Appeals that would raise substantial questions, while the actual grounds of decision might have been different. This Court made a similar remand in Northcross v. Board of

Education, 412 U.S. 427, 37 L.Ed.2d 48, 93 S.Ct. 2201 (1973), where no grounds were given below for holding whether attorney's fees should be awarded to counsel in a desegregation suit.

The question arises, whether affirmance without opinion, where there is no disclosure of grounds, is a denial of due process of law. However **Taylor v. McKeithen** did not address this issue, and specifically limited itself to the circumstances of that case. The practice of affirmance without opinion subsequently survived a due process attack in **United States v. Baynes**, 548 Fd.2d 481 (3rd Cir. 1977), citing **Taylor v. McKeithen** and **N.L.R.B. v. Amalgamated Clothing Workers of America**. Recently the Fifth Circuit itself, in **Ates v. Commissioner of Internal Revenue**, 672 F.2d 468 (5th Cir. 1982), cited **Taylor v.**

McKeithen as a sort of "pat on the back," as authority that the Supreme Court:

> "has apparently agreed that the Courts of Appeal in disposing of their business may, where appropriate, decide cases without written opinion by a rule such as Rule 21 of this circuit." 672 F.2d 468, 469."

To petitioner's knowledge, this Court has not spoken on whether affirmance without opinion, or affirmance with no indication of grounds, is a denial of due process of law.

Since the Fifth Circuit promulgated Local Rule 47.6, most of the circuits have made local rules permitting decisions without opinions. Statistics on the number of decisions without opinions are not published per se, and must be extrapolated from the annual **Federal Court Management Statistics** of the Administrative Office of the United

States Courts.[23] In recent years they have ranged from some 35% (about 1 in 3, in 1975) to some 13% (about 1 in 7, in 1980) of the total appeals terminated after hearing or submission on briefs.

Petitioner submits that decisions without opinions are of sufficiently significant impact on the federal appellate system, to warrant the Supreme Court's exercise of supervision. The case below is a good example. The Fifth Circuit on appeal set both Lee II and Lee III for oral argument[24], then affirmed

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[23] Appendix, p. H-1.

[24] I.e., determined that they were not "frivolous," etc. Implicit in FRAP 34(a), Appendix, p. G-6, and widely used, is a screening process whereby the Courts of Appeal classify substantial numbers of appeals, after briefing, as not requiring oral argument if they are frivolous, or their dispositive issues have been recently decided, or the briefs and record are adequate for decision thereon. Generally this is referred to as placing a case on the "summary calendar."

both, unpublished, without opinion, ostensibly upon the grounds that the District Court's findings of fact below were correct and dispositively so - though there were no findings of fact, at issue or otherwise.

Petitioner knows neither how many other cases have followed such a course, nor of any way of finding out. The combination of withholding publication of opinions (which protects them from professional, scholarly or judicial criticism) and affirming without opinion (if no grounds are indicated) may be creating an informal body of ad hoc case law, existing side-by-side with the publicly and professionally known body of published opinions, but governed by different rules of law or none at all. This possibility, also, calls for an exercise of the Supreme Court's power of

supervision.

3. Affirmance in Contravention of Local Rules.

Petitioner submits that the Fifth Circuit's issuance of an affirmance without opinion, with reference to Local Rule 47.6, is a violation of the Fifth Circuit's local rules where there were no findings of facts below, "dispositive" or not. The Court should consider whether this in and of itself is a departure from the usual and accepted course of judicial proceedings, or a denial of due process.

4. Judgment Dismissing For Prescription Of One Action, As Bar To Later Suit On Another Action.

The Lee III District Court opinion held both that Lee III stated an unprescribed "possessory action," and that Lee II was res judicata to Lee III. The District Court's Lee II opinion however held Lee

II to state an "action of nullity or rescission," that had prescribed. The District Court in Lee III thus applied the doctrine of res judicata, despite the distinction it held to exist between the former cause of action and the present one.

The requisite for the application of res judicata, that the present and former causes of action be identical, has its roots in antiquity. Judge Learned Hand said of it, in **Irving National Bank v. Law**, 10 F.2d 721 (1926), 724, that "All this is very old law." Before modern code pleading, litigants had to specify proper causes of action or suffer dismissal for failure to do so. But a decision, dismissing a former action as stating the wrong (or a prescribed) cause of action, did not bar a subsequent suit on a correct and viable one. The penalty

exacted for stating the wrong cause of action was delay of justice, not denial. If a plaintiff brought a prescribed or otherwise unavailable cause of action and suffered dismissal, when he would have been allowed to pursue another available one, there was no reason for his "slip of the pen" to deny him a cause of action that could have been brought originally.

The "action of nullity or rescission" and the "possessory action" are distinct causes of action under Louisiana law.

The former is a very limited cause of action, which lies only to cancel an agreement which is void for vices of capacity (such as the minority or disability of a party), error, fraud or violence. It is a combination of two French pre-civil code actions, the action of nullity and the action of rescission. The French civil code combined them into

one cause of action, in Article 1304, of which Louisiana's Article 2221 is a translation. The modern, single cause of action has no applicability to suits to avoid a contract which lacked legal consideration ab initio. Gold, **The Five and Ten Year Prescriptive Periods for the Action of Nullity or Rescission of Agreements, Contracts or Other Acts**, 21 Tul. L. Rev. 438, pp.438-442; Planiol, **Traité Elémentaire de Driot Civil**; (1939), §§ 1271-1276, 1287 (English translation by Louisiana State Law Institute); Aubry & Rau, **Civil Law Translations**, §§ 332, 339 (English translation by Louisiana State Law Institute). The limited scope of the action of nullity or rescission is illustrated, in the Louisiana Civil Code, by the Articles providing for its

prescription. La.C.C. Arts. 2221, 3542.[25]

The possessory action is presently set forth in Louisiana Code of Civil Procedure, Articles 3655, 3657 - 3662.[26] In **Houssiere-Latreille v. Jennings-Heywood Oil Syndicate**, 38 So. 932 (La. 1905), p. 935 ff., the Louisiana Supreme Court held specifically that the action lies, on behalf of a lessor against a lessee, where the lessor contends that the lease is void for want of serious consideration and the right of the lessee to cancel.

Prescription of the "possessory action" is provided by different articles of the Louisiana Civil Code - e.g., Article 3456[27] - than those prescribing the

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25 Appendix, pp. G-11, G-13.

26 Appendix, pp. G-14 ff.

27 Appendix, p. G-13.

"action of nullity or rescission."

This Court has consistently required identity of cause of action for the application of res judicata. See for example, **Sea-Land Services, Inc. v. Gaudet**, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, rehearing denied 415 U.S. 986, 94 S.Ct. 1582, 39 L.Ed.2d 883 (1974). The same-cause-of-action requirement of Louisiana res judicata is if anything stricter than res judicata elsewhere. It is "stricti juris," and does not bar a second suit "when there is any doubt of [its] applicability." **Scurlock Oil Co. v. Getty Oil Co.**, 294 So.2d 810 (La. 1974), p. 818. See also **Mitchell v. Bertolla**, 340 So.2d 187 (La. 1976), holding in effect that a prior suit on one cause of action on one ground, is not a bar to a subsequent suit on the same cause of action on other grounds.

The possessory cause of action is a continually accruing one, and prescription does not begin to run until the defendant's interference with the owner's possession of the property ceases - as here International's has not. **Green v. Chamberlain**, 60 So.2d 120 (La.App. 1952); **Dixon v. American Liberty Oil Co.**, 77 So.2d 533 (La. 1954); **Chauvin v. Kirchhoff**, 194 So.2d 805 (La.App. 1967). A former suit on a cause of action does not bar a subsequent one, even on the same nominal cause of action and even upon substantially similar facts, if the facts underlying the latter suit have occurred or arisen subsequent to the former. **Lawlor v. National Screen Service Corp.**, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

Familiar to most law students is an example usually given to illustrate the

relation between prescription, res judicata, and causes of action, somewhat as follows: A contracts to take B on a journey. A negligently runs off the road, injuring B. B has two causes of action arising from the same facts, one in tort and a second in contract. The statute of limitations on a tort action is one year; on a contract action, ten years. Two years later B sues A, and A pleads prescription. If B's complaint also states the contract action he may proceed with it. If not he may bring it later - the prescription of the tort action is no bar, nor is the prior dismissal. In short, more than one cause of action can arise from the same facts; and there is no compulsory joinder of causes of action.

Without an opinion it is impossible to tell at what point the Fifth Circuit

diverged from the above example's logic.

It may have been frustrated by Lee's, then petitioner's, tedious repetitive litigation. But from their point of view, there has been no litigation at all - merely a series of erroneous dismissals preventing it.

It may have thought that La.C.C.Arts. 2221, 3542 prescribe, not an "action," but virtually any suit to escape any null or void agreement. But the present Louisiana Civil Code Articles 2221 and 3542 were adopted in 1870. They trace back to the 1825 and 1808 Louisiana Civil Codes, and thence to the 1804 Code Napoleon of France. In stating the prescription for the "action of nullity or rescission," they encompassed only that action - not any civil action that might have the result of anulling, voiding, cancelling, or otherwise

escaping a void contract, in the layman's sense of those words. Replacement of the forms of action with a unified form of civil action, in the federal courts as elsewhere, did not "abridge, enlarge or modify any substantive right" that previously existed. 28 U.S.C.A. §2072.[28] In a jurisdiction with a unified single form of civil action, prescription bars nevertheless only that which would have been the cause of action specified by the statute of limitations. This is as true in Louisiana as in other states. **Duer & Taylor, Blanchard, Walker, O'Quin, & Roberts**, 558 F.2d 328 (5th Cir. 1977), 354 So.2d. 192 (La. 1978), 568 F.2d 472 (5th Cir. 1978).

The Fifth Circuit may have found petitioner's reliance on the

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[28] Appendix p. G-2.

"technicalities" of "causes of action" archaic, an attempt to "get around the law." But it was International that chose the "technicalities" arena, by moving for dismissals on precisely the technicalities of what cause of action was stated and whether it had prescribed.

Or perhaps the Fifth Circuit thought the Louisiana Supreme Court's dicta as to the Lease's consideration, when the Lee I writs were denied, should be taken as Louisiana law under **Erie R. Co. v. Tompkins** and should override the Fifth Circuit's own contrary conclusion in the **L.L. Brewton Lumber Co.** case. Or possibly the it felt that Lee II had decided, not just the nature of the complaint before it, but that any suit by Lee would be an "action of nullity or rescission" and barred; and that this opinion, though wrong, was res judicata. Or perhaps the

Fifth Circuit felt the District Court, which wrote Lee II, should have the right to interpret it definitively.

Absent an opinion all of the possibilities cannot be covered, but petitioner sees serious problems in any of them. In effect, what has happened below is as follows: On Monday a court holds a plaintiff to state a cause of action he disavows. The court dismisses his suit for prescription of the disavowed cause of action, either ignoring another action claimed to be stated or holding it not to be stated, it matters not which. On Tuesday plaintiff sues again, stating the claimed, unprescribed cause of action beyond dispute. The court holds the cause of action to be stated, and unprescribed. However it dismisses again, on the grounds that the cause of action was

decided the day before. This is not the accepted and usual course of judicial proceedings.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Fifth Circuit, because of the important role that affirmances without opinion have come to play in the Courts of Appeal; the need for this Court's supervision of such affirmances; and additionally because of the fundamental nature of the errors below as to the interplay between the concepts of "cause of action," "prescription," and "res judicata," and the Federal Rules of Civil Procedure.

Respectfully submitted,

Robert B. Eubank

APPENDIX A

OPINION AND JUDGMENT OF DISTRICT COURT

LEE II

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

* *

LEE LUMBER COMPANY : CIVIL ACTION

-vs- : NO. 77-1097

INTERNATIONAL PAPER

COMPANY :

* *

RULING ON MOTION

This matter is presently before us on a motion for summary judgment under Rule 56 filed by defendant International Paper Company (hereinafter "International"). Jurisdiction is based on diversity of citizenship. 28 U.S.C.A. 1 1332.

The pleadings and exhibits establish the following facts beyond dispute. On

June 1, 1946 plaintiff Lee Lumber Company, Ltd. (hereinafter "Lee Lumber") leased approximately 18,000 acres of timber land located in the Parishes of Rapides, Grant and Avoyelles to International. The lease provided for an annual rental payment of $1,400, payable in January. The lease term was for 61 years and 5 months, commencing January 1, 1945.

On September 18, 1973 Lee Lumber filed suit in the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, alleging that the aforementioned lease was a nundum (sic) pactum and void ob (sic) initio on several grounds: First, the lease contained a potestative condition in that the lessee had the unilateral right to cancel the lease; second, the lease lacked serious consideration since the

annual rental amounted to approximately 7.7 cents per acre whereas the potential commercial timber growth was valued at $5 per acre at the time the lease was entered; third, the rental payments were lesionary since they were less than one-half the value of the rights granted under the lease. It was also alleged that International had not paid the taxes as obligated by the lease. Lee Lumber prayed for the following relief: That the lease be declared null and void; that the recordation of the lease be cancelled; and that it be placed in full possession of the land, free and clear of the lease.

The trial court sustained International's peremptory exception of prescription. The Second Circuit Court of Appeal affirmed this ruling. **Lee Lumber Co. Ltd. v. International Paper Co.**, 321 So.2d 42 (1975). At the outset the Court

of Appeal rejected Lee Lumber's contention that the unilateral right of the lessee to cancel the lease was a potestative condition under the Louisiana Civil Code. The Court then found that the action to cancel the lease for lack of serious consideration had prescribed under either Louisiana Civil Code art. 3542, which provides that an action for nullity or rescission of contract prescribes in 5 years, or Louisiana Civil Code art. 2221, which provides that an action for nullity or rescission of an agreement prescribes in 10 years whenever a shorter period is not applicable. The Court then determined that the doctrine of lesion was not applicable and, in any event, the action for lesion prescribed in 4 years under Louisiana Civil Code arts. 1862 and 1867. However, the Court found that the cause of action based on

the alleged failure of International to pay the annual rentals and taxes had not prescribed since this obligation was a continuing one. This issue was remanded to the trial court for determination of whether the failure of International to perform its rental obligations gave Lee Lumber cause to dissolve the lease.

On remand the trial court held that Lee Lumber was equitably estopped from cancelling the lease because of International's failure to pay or timely pay the taxes as agreed. The Court of Appeal agreed. **Lee Lumber Company, Ltd. v. International Paper Co.**, 345 So.2d 212 (La.App. 3rd Cir. 1977), writ denied 347 So.2d 503. In the lease entered into on June 1, 1946, Lee Lumber explicitly agreed to pay the taxes assessed against the land and it was implicit that International would pay the taxes

assessed against the timber. In 1950 the lease was amended to provide that International would pay the taxes assessed against both the land and timber to the extent they were in excess of the $1400 annual rental upon Lee Lumber's submission of tax receipts showing payment of taxes for the year currently due. Lee Lumber alleged that International had failed to perform its obligations in two respects, viz., that it did not pay any of the taxes for the period 1946 to 1950 and beginning in 1951 International made payments of taxes paid by Lee for the previous year rather than those for the year currently due. As to the non-payment of taxes the record established that the taxes were always assessed in the name of Lee Lumber and Lee Lumber never made any demands for payment. Concerning the late payment of

taxes the Court found that the record indicated that Lee Lumber had always accepted the payments after the date they were due and never made any demand to the contrary. The Appellate Court concluded that the trial court was correct in holding that Lee Lumber was equitably estopped from demanding the cancellation and voidance of the lease and stated:

> "As in this case, where a lessor, by his conduct - no demand for taxes during the years 1946 to 1950; accepting of rental payments for the years 1951 thru 1973, after the date on which they were due - creates a custom by which the lessee is led into a false sense of security that it has complied with its obligations as lessee, the lessor thereby waives his rights to cancel the lease and is estopped from doing so." Id. at 214.

On September 30, 1977 Lee Lumber filed the instant action seeking a declaratory judgment that the lease is null and void and declaring it to be entitled to immediate possession of the 18,000 acres.

In addition, plaintiff seeks an injunction restraining defendant from entering the land and restitution for any timber cut by defendant.

In its motion for summary judgment International has raised defenses of res judicata, prescription and equitable estoppel. For the reasons set forth below, we hold that the plaintiff's action has prescribed under arts. 3542 and 2221 of the Louisiana Civil Code.

Plaintiff has asked this court to declare a lease entered into over thirty years ago null and void. Plaintiff alleges in his complaint that the lease is void under Louisiana law because it contains a potestative condition, lacks serious consideration and is uncertain as to object, price and term. In its complaint plaintiff alleges that the action for declaratory judgment is based

on four underlying causes of action, to-wit: (1) a possessory action; (2) an action to quiet title; (3) an action for recovery of a thing not due; and (4) an action for eviction. The complaint also states that all of the underlying causes of action are based on the invalidity of the lease.[1/]

It is well settled that the nature of the basic action determines the

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1/ For example, Paragraph 12 of the complaint alleges:

CAUSE OF ACTION FOR RECOVERY OF THING NOT DUE

(a) Under Louisiana law, plaintiff, having surrendered to defendant a thing (the 18,000 acres and timber cut from them) which was not due, because of the invalidity of the lease, has a cause of action to recover it;

(b) The only claim defendant has to the retention of the 18,000 acres of timber land, and timber cut from such lands, or the proceeds thereof, is the 1946 lease.

(c) The lease, for the reasons noted above, is void under Louisiana Law.

appropriate prescriptive period. See, e.g. **Giroir v. Dumesnil**, 184 So.2d 1 (La. 1966), and **Giuffria Realty Co., Inc. v. Kathman-Landry, Inc.**, 173 So.2d 329 (La.App. 4th Cir. 1965). In **Giuffria** the plaintiff sold some property to a third party in 1927 who subsequently sold the property to defendants in 1947. The plaintiff brought an action to remove cloud from title contending that the 1927 transfer was invalid for various reasons, that it should be decreed the owner of the property and that various notarial acts transferring the property be cancelled from the public record since they created a cloud on its title. In spite of the fact that plaintiff had brought his action as one for the removal of a cloud from title, the court determined that it was in reality an

action seeking to nullify or rescind the 1927 transaction. In finding that the trial court had properly maintained the defendant's defense of prescription the court stated:

> "Prescription to apply to a cause of action is determined by the nature of the action. Herein, since the action is one of nullity or rescision, the ten year prescription of LSA-C.C. art. 2221 would apply."

Plaintiff has asked this court to declare the 1946 lease invalid. All of the so-called underlying causes of action are predicated on the alleged invalidity of the lease. Obviously the plaintiff has really brought an action to rescind or nullify a lease. As mentioned above, the nature of the action determines the appropriate prescriptive period. The prescription applicable to an action for rescission or nullity of a lease is provided by either Article 3542 or

Article 2221 of the Louisiana Civil Code.

Article 3542 provides, in pertinent part:

> "The following actions are prescribed by five years: that for the nullity or rescission of contracts,[2/] testaments or other acts."

Article 2221 provides, in pertinent part:

> "In all cases, in which the action of nullity or of rescission of an agreement, is not limited to a shorter period by a particular law, that action may be brought within ten years."

The lease that plaintiff seeks to have declared null and void was entered into on June 1, 1946 - more than 27 years before plaintiff first attempted to nullify the lease in state court. Without a doubt, plaintiff's action in this court to nullify and invalidate the lease has

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2/ Needless to say, a lease is a contract. Article 2669 of the Louisiana Civil Code provides: "Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor at a fixed price."

prescribed long ago under the terms of either Article 2221 or 3542.

However, the prescriptive periods of Articles 3542 and 2221 apply only to relative nullities; they do not run against absolute nullities. **Fried v. Bradley**, 52 So.2d 247 (La. 1950). Absolute nullities are those that are in derogation of pubic order and good morals whereas relative nullities are those established in the interest of individuals. The theory behind the prescription applicable to an action for nullity or rescission is that a person is presumed to ratify the defects in an act when he does nothing about them over a period of time. Absolute nullities are insusceptible of ratification because the "ratification would itself be tainted with the vices reprobated in the act sought to be ratified." Id. at 252.

Herein the defects in the lease are alleged to be the lack of serious consideration, the presence of a potestative condition and uncertainty of object, term and price. Both lack of adequate consideration, **Giuffria Realty Co., Inc. v. Kathman-Landry, Inc., supra**, and uncertainty of object, price and term, **Prestridge v. Humble Oil & Refining Co.**, are considered to be relative nullities and subject to ratification.

We need not consider whether the presence of a potestative condition constitutes an absolute nullity because we find that the lease does not contain one. The potestative condition alleged to exist herein is the unilateral right of the lessee to cancel the lease. This contention has already been rejected by the courts of Louisiana. **McCain v. Continental Can Co.**, 299 So.2d 454

(La.App. 2d Cir. 1974), writ refused 302 So.2d 308; **Thibodeaux v. Boeuf Land Co., Inc.**, 303 So.2d 576 (La.App. 1st Cir. 1974).

Plaintiff argues that he can avoid the prescriptive periods applicable to actions for nullity or rescission by bringing his action as one for declaratory judgment based on underlying causes of action (the possessory action, the action to quiet title, the action of eviction, and action for recovery of a thing not due) that he alleges have not prescribed. Plaintiff maintains that defendant must respond to the above action by asserting his rights under the lease by a counter-claim or separate action. Plaintiff's scenario then contemplates that he would respond by asserting an action for nullity or rescission which would not be barred by

prescription because Louisiana Code of Civil Procedure art. 424 provides that a prescribed cause of action may be raised as a defense.

We find plaintiff's argument unpersuasive because it is not supported by Louisiana jurisprudence and more fundamentally, because its acceptance would result in an emasculation of the Louisiana prescription law in the area of nullity and rescission.

Plaintiff cites Giroir v. Dumesnil, 184 So.2d 1 (La. 1966), for the proposition that in the case of an action for declaratory judgment the applicable period of prescription is that period applicable to the causes of action underlying the action for declaratory judgment. This does not present any obstacle to our holding that plaintiff's action is barred by either Article 3542

or Article 2221. As already indicated above, we consider the basic action underlying plaintiff's action for declaratory judgment to be that of nullity or rescission on which the prescriptive period began to run the day the lease was entered into.

In support of its contention that the underlying causes of action have not prescribed, plaintiff asserts that the action to quiet title and the possessory action accrue as long as the lease, i.e., the cloud on the title or the disturbance in possession remains in existence. The cases of **Dixon v. America Liberty Oil Co.**, 77 So.2d 533 (La. 1954), **Green v. Chamberlain**, 60 So.2d 120 (La.App. 1st Cir. 1952), and **Chauvin v. Kirckhoff**(sic), 194 So.2d 805 (La.App. 1st Cir. 1967), are cited in support. However, these cases merely hold that the

continued existence of a lease on the public records, as well as the initial recordation, constitute a cloud on the title or disturbance in possession. None of the cited cases were concerned with the applicability **vel non** of articles 3542 or 2221.

Plaintiff also asserts that an action for the recovery of a thing not due does not accrue and the prescription does not begin to run until the time of the repudiation of the void agreement. Plaintiffs cites the case of **Lagarde v. Dabon**, 98 So. 744 (La. 1923) in support. However, that case did not involve a situation where a party to a contract was attempting to have it invalidated or rescinded. Rather it was concerned with the situation where a party to a partnership that the court considered invalid because it was not reduced to

writing sought to recover assets she had invested in the partnership from the heirs of the other partner.

Plaintiff cites no authority in support of his contention that he can avoid the application of the Louisiana Civil Code articles governing the prescription applicable to actions for nullity or rescission by bringing an action for eviction.

If we accepted plaintiff's argument, then a party to a contract made years ago that no longer considered the contract economically advantageous could simply search the contract for some technical error and then bring a declaratory judgment based on the underlying causes of action as specified by plaintiff. Quite plainly, plaintiff's argument files (sic) in the fact of articles 2221 and 3542 and the basic policy of the law they

serve.

> "The genius of our law does not favor the claims of those who have long slept on their rights, and who, after years of inertia, conveying an assurance of acquiescence in a given state of thing, suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief, under the effect of a newly discovered technical error in some ancient transaction or settlement." **Lafitte, Dufilho & Co. v. Godchaux**, 35 La.Ann. 1161, 1163 (1883).

Accordingly, the defendant's motion for summary judgment is granted.

A form of judgment consistent with this opinion should be submitted within ten days of date.

Alexandria, Louisiana, this the 7th day of November, 1978.

/s/Nauman S. Scott
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

Lee Lumber Company, Ltd.	:Civil Action
-vs-	:No. 77-1097
International Paper Company	:

SUMMARY JUDGMENT

This cause having regularly come on for hearing on the Motion for Summary Judgment filed by defendant herein, International Paper Company, on the 21st day of November, 1978, briefs and/or memoranda of authority having been submitted by counsel, oral argument having been presented by counsel for all parties in open court on January 3, 1978, the Court having considered the law and the evidence, the law and the evidence being in favor of defendant-mover,

International Paper Company, and for written reasons previously assigned and filed herein, under date of November 7, 1978; it is, therefore

ORDERED, ADJUDGED AND DECREED that the defendant's motion for summary judgment be and it is hereby granted and that there be summary judgment herein, in favor of defendant, International Paper Company, and against plaintiff, Lee Lumber Company, Ltd., forever dismissing in its entirety the complaint filed by plaintiff in this action, and denying all demands of plaintiff set forth therein, all at plaintiff's cost.

Judgment rendered on November 7, 1978, and signed at Alexandria, Louisiana, on this the 15th day of December, 1978.

/s/Nauman S. Scott
United States District Judge

APPENDIX B

DECREE OF COURT OF APPEALS

LEE II

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-1309

LEE LUMBER COMPANY, LTD.,

Plaintiff-Appellant,

versus

INTERNATIONAL PAPER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court of the Western District of Louisiana

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(May 15, 1980)

Before GODBOLD, SIMPSON and THOMAS A.

CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

APPENDIX C

OPINION AND JUDGMENT OF DISTRICT COURT

LEE III

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

ROBERT EUBANK, INDI-	:	
VIDUALLY AND ON BEHALF	:	
OF ALL OF THE SHARE-	:	
HOLDERS OF LEE LUMBER	:	
CO., LTD.	:	
	:	
-VS-	:	CIVIL ACTION NO:
	:	82-1446
INTERNATIONAL PAPER	:	
COMPANY	:	

RULING

The present action before this court is a Motion to Dismiss for failure to state

a claim upon which relief can be granted by plaintiff, Lee Lumber Company (hereinafter "Lee") against defendant, International Paper Company (hereinafter "International"). We converted the motion into one for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.[1/] Specifically, this action arises out of a lease agreement between Lee Lumber Company as lessor and International as lessee, involving certain immovable property located in the parishes of Rapides, Grant and Avoyelles, constituting approximately 18,000

1/ By Minute Entry on December 1, 1982, we converted defendant's 12(b)(6) motion to one for summary judgment pursuant to rule 56, Federal Rules of Civil Procedure.

acres.[2/] Suit was filed in this court on June 9, 1982 as a shareholder's derivative action by Robert Eubank, on behalf of all shareholders of Lee Lumber Company against International Paper Company. Plaintiff has asserted a possessory cause of action, alleging that its possession was disturbed as a result of the purported lease between Lee and International that was recorded by International on June 26, 1946. Consequently, Lee Lumber Company is seeking to be placed in possession of the land in question.

There have been several lawsuits filed regarding the particular property in

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2/ By a prior agreement, Lee had sold all of the timber on the land to International. The primary purpose of the lease was future use of the land in growing timber. The lease was entered into on June 1, 1946, and International took possession on that date. The lease term was for 61 years and 5 months.

question, between the same parties. The first suit, entitled **Lee Lumber Company v. International Paper Company**, No. 88-339, was filed on September 18, 1973 in the Ninth Judicial District Court, Rapides Parish, Louisiana. Lee Lumber sought to have a certain lease declared null and void,[3/] and to be placed in possession of the land.[4/] The trial court sustained defendant's peremptory exception of prescription. Thereafter, Lee Lumber appealed to the Court of Appeal, Third Circuit, State of Louisiana. **Lee Lumber Co. v.**

3/ This is the same lease in question presently before the court, executed in 1946.

4/ The causes of action at the trial court level were: (a) potestative condition; (b) 5 and 10 year prescription, Civil Code 3542, Civil Code 2221; (c) lack of serious consideration; (d) lesion beyond moiety; (e) rent and taxes not paid.

International Paper Co., 321 So.2d 42 (La.App. 1976), **writ refused**, 324 So.2d 423 (La. 1976). The Court of Appeals affirmed in part, reversed in part, and remanded.[5/] Subsequently, this decision was affirmed by the Court of Appeal, Third Circuit, State of Louisiana. **Lee Lumber Co. v. International Paper Co.**, 345 So.2d 212 (La.App. 1977), **writ refused**, 347 So.2d 503 (La. 1977).

Thereafter, on September 30, 1977, suit was filed before this court entitled **Lee Lumber co. v. International Paper Co.**, No. 77-1097-A. Lee Lumber sought a declaratory judgment that a lease was

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5/ The issue as to a contractual provision in the lease for payment of taxes was remanded. The trial court held that plaintiff was estopped from raising this issue and held for International Paper Company.

void, and sought possession.[6/] The suit was disposed of by summary judgment in which we held that the main cause of action, that of nullity and rescission of a lease had prescribed.[7/] Our ruling was affirmed by the Fifth Circuit Court of Appeals. **Lee Lumber Co. v. International Paper Co.**, No. 79-1309.

Robert Eubank then filed the present action before this court asserting the possessory cause of action.

Louisiana Code of Civil Procedure defines possessory action in Article 3655:

> "A possessory action is one brought by the possessor of the movable

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6/ The underlying causes of action were: (a) possessory action; (b) action to quiet title; (c) recovery of a thing not due; (d) eviction; (e) potestative condition; (f) uncertainty of thing leased, price and term; (g) absence of serious consideration.

7/ Judgment signed December 15, 1978.

property or a real right to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted."

Furthermore, several requisites must be met in order to be able to maintain the possessory action. Article 3658, Louisiana Code of Civil Procedure, reads:

"To maintain the possessory action, the possessor must allege and prove that: (1) he had possession of the immovable property or real right at the time the disturbance occurred; (2) he and his ancestors in title have such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud; (3) the disturbance was one in fact or in law, as defined in Article 3659; and (4) the possessory action was instituted within a year of the disturbance. See **Plaisance v. Collins**, 365 So.2d 608 (La.App. 1978)."

The prescriptive period relative to the possessory action is found in Civil Code art. 3456:

"But this, which is called the possessory action, must be commenced by the possessor within a year, reckoning

> from the time when he was disturbed; for if he leaves the person evicting him in possession for one year, without complaint, he shall lose his possession, whatever apparent right he may have had to it, and shall be driven to his action for the ownership of the property."

The issues we are concerned with are whether or not the possessory action asserted by Lee Lumber Company was brought within one year of the alleged disturbance, that being the recordation of the lease by International in 1946, and whether or not there has been a "disturbance".[8/] Lee Lumber argues that the prescriptive period is continuous throughout the disturbance,[9/] and therefore the action does not have to be

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8/ All other requirements of Article 3658, La.C.C.P., are not in dispute.

9/ Citing **Dickson v. American Liberty Oil Co.** 77 So.2d 533 (La. 1954); **Green v. Chamberlain**, 60 So.2d 120 (La.App. 1952); **Chauvin v. Kirchoff**, 194 So.2d 805 (La.App. 1967).

brought until one year after disturbance. La.C.C. art 3456. However, a lessor and a lessee may not ordinarily assert the possessory action against each other. Their respective rights are governed by the lease. **Trinidad Petroleum Co. v. Pioneer Natural Gas**, 381 So.2d 808 (La. 1980), **rehearing denied**, April 8, 1980. **See also Developments in the Law, 1979-1980 Mineral Rights**, 41 La.L.Rev. 344. Only in instances when it is manifest that a lease is void can a lessor assert the possessory cause of action. **Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate**, 38 So. 932 (La. 1905). Quoting the court:

> "In a suit, if the lessors wish to avail themselves, as in this case, of their right as owners, and the defendants meet their action by pleading that they are in possession under a valid lease, and sustain their plea to the extent sufficient to at least show that the lease is not void, the plaintiffs are not then in a

position to sustain their possessory action. **Supra** at p. 934."

Under a valid lease agreement, lessor and lessee cannot possess adversely to one another. Rather, a "predial lessee is considered as possessing for this lessor . . .". La.C.C.P. art. 3656.

In plaintiff's earlier suit before this court, our ruling granting defendant's Motion for Summary Judgment was dispositive of the entire claim. We held that the lease in question between the parties was not subject to attack because the cause of action for nullity and rescission of a lease had prescribed.[10/] That being the case, International Paper Company, as lessee, is possessing under a

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10/ Cause of action was nullity of a lease and included the underlying causes of action which were **inter alia** a possessory action.

valid lease agreement.[11/] Therefore, there being no disturbance, the possessory action, which plaintiff states is his only cause of action,[12/] is not a proper action before us. Therefore, defendant's Motion for Summary Judgment is granted, as this suit is without any genuine issue of material fact.

DONE AND SIGNED at Alexandria, Louisiana, on this the 3rd day of February, 1983.

/s/Nauman S. Scott
United States District Judge

11/ Assuming arguendo that the lease was void, then plaintiff would be correct i his assertion that the action could be brought within one year after the disturbance.

12/ See affidavit of Robert Eubank filed December 13. 1982.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

ROBERT EUBANK, INDI-	:	
VIDUALLY AND ON BEHALF	:	
OF ALL OF THE SHARE-	:	
HOLDERS OF LEE LUMBER	:	
CO., LTD.	:	
	:	
-VS-	:	CIVIL ACTION NO:
	:	82-1446
INTERNATIONAL PAPER	:	
COMPANY	:	

J U D G M E N T

For written reasons assigned this date, it is

ORDERED, ADJUDGED AND DECREED that all claims brought by plaintiff against

defendant, International Paper Company, be dismissed with all costs taxed to plaintiff.

Alexandria, Louisiana, this the 3rd day of February, 1983.

/s/Nauman S. Scott
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

ROBERT B. EU[illegible]NK, Individually
and on behalf of all of the
shareholders of Lee Lumber
Co., Ltd.

-vs- : CIVIL ACTION NO.
82-1446

INTERNATIONAL PAPER
COMPANY

AMENDED RULING

In the court's ruling on February 3, 1983 the first sentence of the first paragraph as corrected should read:

The present action before this court is a Motion to Dismiss for failure to state a claim upon which relief can be granted by defendant, International Paper Company

(hereinafter "International") directed to plaintiff, Lee Lumber Company (hereinafter "Lee").

DONE AND SIGNED at Alexandria, Louisiana, on this the 23rd day of February, 1983.

/s/Nauman S. Scott
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually
and on behalf of all of the
shareholders of Lee Lumber
Co., Ltd.

-vs- : CIVIL ACTION NO.
82-1446

INTERNATIONAL PAPER
COMPANY

AMENDED JUDGMENT

For written reasons assigned on February 3, 1983, it is

ORDERED, ADJUDGED AND DECREED, that because defendant's Motion for Summary Judgment has been granted, all claims brought by plaintiff against defendant, International Paper Company, shall be

dismissed with all costs taxed to plaintiff.

Alexandria, Louisiana, this the 23rd day of February, 1983.

/s/Nauman S. Scott
United States District Judge

APPENDIX D

DECREE OF COURT OF APPEALS

LEE III

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-4112

ROBERT B. EUBANK, Individually
and On Behalf of All Other
Shareholders of Lee Lumber Company,
Plaintiff-Appellant

versus

LEE LUMBER COMPANY, LTD.,
a Corporation, and INTERNATIONAL
PAPER COMPANY, a Corporation,
Defendants-Appellees .

Appeal from the United States District
Court for the
Western District of Louisiana

(October 27, 1983)

Before POLITZ, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 47.6.

APPENDIX E

ORDER ON MOTION FOR REHEARING

LEE III

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-4112

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Company,

Plaintiff-Appellant,

versus

LEE LUMBER COMPANY, LTD., A Corporation, and INTERNATIONAL PAPER COMPANY, A Corporation,

Defendants-Appellees .

Appeal from the United States District Court for the Western District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/27/83, 5 Cir., 198_, _F.2d_)

(NOVEMBER 28, 1983)

Before POLITZ, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service

not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson

United States Circuit Judge

APPENDIX F

OPINION IN L.L. BREWTON LUMBER CO.

V. CONTINENTAL CAN CO.

U.S.D.C., W.D.LA. NO. 14680 (12/11/72)

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

CIVIL ACTION

NO. 14,680

L. L. BREWTON LUMBER COMPANY, INC.

versus

CONTINENTAL CAN COMPANY, INC.

FOR PLAINTIFF MESSRS.
Hiram J. Wright
P. O. Box 626
Winnfield, Louisiana 71483

FOR DEFENDANT William H. Baker
Holloway, Baker, Culpepper
& Brunson
Post Office Box E
Jonesboro, Louisiana 71251

SCOTT, JUDGE:

This is an action to annul and can el an instrument styled "Contract for Sale and Purchase of Timber and Land Lease" executed by Louisiana Development Company, Inc., Lessor, in favor of Mansfield Hardwood Lumber Company, Lessee, dated September 9, 1950, and covering approximately 1360 acres of land in Winn Parish, Louisiana. Plaintiff, L. L. Brewton Lumber Company, Inc., (hereinafter referred to as "Brewton"), is the successor in title of the original leassor [sic], Louisiana Development Company, Inc. and Continental Can Company, Inc. (hereinafter referred to as "Continental"), is the successor in title to the original lessee, Mansfield Hardwood Lumber Company.

The agreement in question provides for

the sale of timber and then provides further for a lease for the sole purpose of cutting and removing existing timber and for the growing, cutting and removing of timber during the term of the lease or any renewal or extension thereof. (Emphasis supplied). The specific pertinent provisions are the following:

> "2. As a part of the consideration for this agreement, Seller-Lessor leases and lets and by this act does lease and let unto the Buyer-Lessee, its successors and assigns, to the extent herein provided, and subject to the terms and conditions hereof, the real estate hereinabove first described for a term of nine (9) years from the date hereof for the purposes herein expressed, and hereby grants to Buyer-Lessee, its successors and assigns, the right and option to make successive extensions or renewals of this lease for a term of nine (9) years each upon the conditions herein set forth, provided, that this lese may not be extended beyond a date ninety-nine (99) years from the date hereof. In order to renew this lease, Buyer-Lessee shall give written notice to Seller-Lessor of its intention to do so before the expiration of each successive nine-year term.

3. Buyer-Lessee may successively renew or extend this lease for successive nine year terms by giving Seller-Lessor written notice of its intention to do so and by paying to Seller-Lessor on or before the date of the expiration of each nine year term an amount equal to the real property taxes and local assessments which Seller-Lessor has paid on the land described in this lease during the nine years immediately preceding the expiration of such nine year term.

Seller-Lessor shall notify Buyer-Lessee at least thirty days prior to expiration of each nine year term that the lease will expire unless renewed and at the same time advise as to the amount of the necessary renewal payment. If such notice is not given, then Buyer-Lessee shall have thirty days after Seller-Lessor given such notice in which to give notice of intent to renew and to make the payment herein provided for.

4. During the terms of this lease or any renewal or extension thereof, as herein provided, Buyer-Lessee shall have the right to remove standing or growing timber, wood and forest products from the leased premises; . .

6. The Buyer-Lessee, upon the execution of this instrument, has paid to the Seller-Lessor the sum of Twenty Thousand and No/100 ($20,000.00) Dollars in cash, and other good and valuable consideration, the receipt of which is hereby acknowledged and a full

acquittance is granted therefor; the same being paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all other rights hereby granted to Buyer-Lessee.

(h) Each Seller-Lessor warrants the title to the timber, wood and other forest products herein leased only so far as the interest owned by each Seller-Lessor, but it is agreed that in the event of eviction of the Buyer-lessee from any portion of said land on account of failure of title to any portion thereof, that the obligation of the Seller-Lessor under his warranty shall be limited to the refund of the proportionate part received by him in cash of the sum of Fifty and No/100 ($50.00) Dollars per acre on the lands to which title fails or from which Buyer-Lessee is evicted, at the time of such eviction or title failure." (Emphasis supplied).

In the first hearing this Court did not consider the validity of the 1950 contract as a timber sale with a stipulated term for removal. This question was not before the Court, since plaintiff made no demand for timber cut before 1967. No party has claimed that the 1950 contract was not a valid sale

agreement. However, this Court did consider the validity of the agreement as a lease and, for reasons stated in that opinion, held the agreement to be invalid as a lease. The Court of Appeals reversed in part holding that the agreement was valid as a lease agreement for the original nine year term thereof, "the basic lease", and remanded "for consideration of the undisposed of issues".

The agreement, by its own terms, is not a 99 year lease. It provides for a nine year lease, with options to renew for a term of nine years each, not in excess of ninety-nine (99) years from the date of the instrument.

The Court of Appeals, in its interpretation of the agreement in question, found that the $20,000 consideration was paid for the sale of

the timber, the initial nine year term of the lease, and the options to renew the lease. It also found the rent or consideration for each nine year renewal period to be an amount equal to the real property taxes and local assessments Seller-Lessor had paid on the land during the nine years immediately preceding the expiration of such nine year term. Therefore, the issue now before this Court is whether or not this is a valid rent or consideration under Louisiana law.

The Civil Code of Louisiana spells out the requirements for a valid lease in the following articles:

> Art. 2669: Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.
>
> Art. 2670: To the contract of lease, as to that of sale, three things are

absolutely necessary, to-wit: the thing, the price and the consent.

Art. 2671: The price should be certain and determined and should consist of money.

Art. 2674: To let out a thing is a contract by which one of the parties binds himself to grant to the other enjoyment of a thing during a certain time, for a certain stipulated price which the other binds himself to pay him.

Under the provisions of Article 2464 of the code in the amount of the rent must be serious, that is the amount of the rent cannot be out of all proportion to the value of the lease.

The landmark decision in Louisiana on the doctrine of serous consideration is Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906). In considering the validity of the lease before it the Louisiana Supreme Court stated:

"At common law 'the slightest consideration is sufficient to support the most onerous obligation. The inadequacy, as has been said, is for

the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.' 9 Cyc. 365; A. & E. E. vol. 6., p. 694. But under our law the consideration 'must be serious': 'it must not be out of all proportion with the value of the thing.' Article 2464, Civ. Code. That article has special reference to the price of a sale, but the principle it involves is not peculiar to sales. It is a general principle of the civil law, and as old as the civil law itself."

Another case involving the validity of a lease in the city of Monroe is Northeast Louisiana Detachment of Marine Corps League v. City of Monroe, 253 So.2d 107 (1971) in which the Louisiana Court of Appeals, Second Circuit, stated, as follows:

"A lease is a synallagmatic contract by which one party gives to the other the enjoyment of a thing 'at a fixed price'. LSA Civil Code Article 2669. Three elements are essential to a valid lease - the thing, the price and the consent. LSA Civil Code Article 2670. Article 2671 provides that the price should be 'certain and determinate' and Article 2674 requires a 'certain stipulated price'. Article 2464 sets forth the essential elements of the

price of a sale and requires that the price must be 'certain', 'fixed and determined' and, must significantly, 'serious' and 'not to be out of all proportion with the value of the thing'. the civil law doctrine embodied in Article 2464 applies to all other contracts as well as to sales. Blanchard v. Haber, 166 La. 1014, 118 So. 117 (1928)."

The renewal periods or extensions of the lease are extremely valuable to the lessee. The agreement covers 1360 acres (only as undivided 3/5 interest in 260 acres thereof). In paragraph 13 of the Stipulation, defendant admits it cut in 1951 and 1952 the following amounts of timber:

Pine Saw Logs	115,062 board feet
Hardwood Saw Logs	9,201 board feet
Pine Pulpwood	34.97 cords
Hardwood Pulpwood	17.44 cords

It further admits in Paragraph 15 that it has continued to cut timber on the land up until 1969, but has no records showing the amount of timber cut. The amount of timber situated on these

tracts, as of the date of trial, is stipulated (Par. 8 & 9) to be the following:

	1100 Acre	260 Acre
Pine Saw Logs (board feet)	1,470,720	1,218,260
Hardwood Saw Logs (board feet)	88,560	84,240
Pine Pulpwood (cords)	7,530	340

Applying the stipulated present day stumpage values (Stipulation p. 10) to these figures, the value of the lease for the nine year period beginning 1968 is $178,120 ($113,400 on the 1100 acre tract and $64,720 on the balance).* The ordinary timber lease would provide that the lessor receive as rent a reasonable

---

* As stipulated (Par. 11), timber on the property grows and has grown approximately six (6%) per cent to seven (7%) per cent per year. During a renewal period of 9 years the land would produce in natural growth alone, without the expenditure of one single dime by Continental, additional growth of approximately $96,183 to $112,212.

percentage of the monetary return from the timber cut. This lease provides no such rent or similar payment to the Lessor. Lessor will receive nothing from the products of the land, in money or in kind.

Certainly it is contemplated under the doctrine of serious consideration that the Lessor realize some profit from the lease in the form of rent. However on the face of this agreement the Lessor is guaranteed a loss. The only rent stipulated is the reimbursement of taxes, without interest, 9, 8, 7, 6, 5, 4, 3, 2 and 1 years after the Lessor has paid them. Under this type of arrangement no profit to the Lessor is conceivable. Furthermore, the Lessor is permitted to occupy and use the land for a lesser sum than if he were the fee owner. To illustrate these facts, in the first nine

year renewal period of the lease, the Lessee paid only $2,728.48 in rent while the owner was paying $4,022.82 in current taxes and assessments. Surely this cannot be considered serious consideration, even if there were no timber on the property and the land was bare. Under no conditions can rent, consisting solely of the reimbursement of taxes, be considered serious consideration as contemplated by Louisiana law.

The term of the original lease having expired, there being no valid provisions for the extension or renewal thereof, judgment will be granted cancelling and erasing the 1950 lease agreement from the public records and reserving plaintiff's right to sue for damages.

Formal judgment should be submitted for execution in compliance with Rule 9(e) of this Court.

THUS DONE AND SIGNED, in Chambers, at Alexandria, Louisiana, on this 8th day of December 1972.

/s/Nauman S. Scott
UNITED STATES DISTRICT JUDGE

APPENDIX G

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENTS V AND XIV, SECTION 1

[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

public use, without just compensation.

[AMENDMENT XIV]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

TITLE 28 SECTION 2072

§ 2072. Rules of civil procedure. The Supreme Court shall have the power to prescribe by general rules, the forms of

process, writs, pleadings and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

RULES 12(B) AND 56(C)

Rule 12. DEFENSES AND OBJECTIONS - WHEN

AND HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS.

* * *

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further

pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 34(A)

Rule 34. ORAL ARGUMENT

(a) **In General; Local Rule.** Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

FIFTH CIRCUIT LOCAL RULES

47.6 AND (FORMER) 21

47.6 Affirmance Without Opinion.

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion

would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Loc.R. 47.6" or "ENFORCED. See Loc.R. 47.6"

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

Fifth Circuit's Draft Of Revision To Rule 21.

September, 1978 Draft Revision to Rule 21.

Rule 21. Affirmance Without Opinion

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; ~~(4) that no issue of law appears;~~ and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or ENFORCED. See Local Rule 21."

See N. L. R. B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

no error of law appears and

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Rule 21. Affirmance Without Opinion.

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21" or "ENFORCED. See Local Rule 21."

See **N.L.R.B. v. Amalgamated Clothing Workers of America**, 5th Cir. 1970, 430 F.2d 966.

LOUISIANA CIVIL CODE

ARTICLES 2034, 2221, 2464, 3456, 3542

Art. 2034. Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself.

Art. 2221. In all cases, in which the action of nullity or of rescission of an agreement, is not limited to a shorter period by [a] particular law, that action may be brought within ten years.

That time commences in case of violence, only from the day on which the violence has ceased; in case of error or deception, from the day on which either was discovered, and for acts executed by married women not authorized, from the day of the dissolution of the marriage or

of the separation.

With regard to acts executed by persons under interdiction, the time commences only from the day that the interdiction is taken off; and with regard to acts executed by minors, only from the day on which they become of age.

Art. 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a

donation disguised.

Art. 3456. But this, which is called the possessory action, must be commenced by the possessor within a year, reckoning from the time when he was disturbed; for if he leaves the person evicting him in possession for one year, without complaint, he shall lose his possession, whatever apparent right he may have had to it, and shall be driven to his action for the ownership of the property.

Art. 3542. The following actions are prescribed by five years:

That for the nullity or rescission of contracts, testaments or other acts.

That for the reduction of excessive donations.

That for the rescission of partitions and guarantee of the portions.

This prescription only commences against minors after their majority.

LOUISIANA CODE OF CIVIL PROCEDURE

ARTICLES 3655, 3657-3662

Art. 3655. Possessory action. The possessory action is one brought by the possessor of immovable property or of a real right therein to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof where he has been evicted.

Art. 3657. Same; cumulation with petitory action prohibited; conversion into or separate action by defendant. The plaintiff may not cumulate the petitory and the possessory actions in the same suit or plead them in the alternative, and when he does so he waives the possessory action. If the plaintiff brings the possessory action, and without dismissing it and prior to judgment

therein institutes the petitory action, the possessory action is abated.

When, except as provided in Article 3661(1)-(3), the defendant in a possessory action asserts title in himself, in the alternative or otherwise, he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action.

If, before executory judgment in a possessory action, the defendant therein institutes a petitory action in a separate suit against the plaintiff in the possessory action, the plaintiff in the petitory action judicially confesses the possession of the defendant therein.

Art. 3658. Same; requisites. To maintain the possessory action the possessor must allege and prove that:

(1) He had possession of the immovable

property or real right therein at the time the disturbance occurred;

(2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;

(3) The disturbance was one in fact or in law, as defined in Article 3659; and

(4) The possessory action was instituted within a year of the disturbance.

Art. 3659. Same; disturbance in fact and law defined. Disturbances of possession which give rise to the possessory action are of two kinds: disturbance in fact, and disturbance in law.

A disturbance in fact is an eviction, or any other physical act which prevents the possessor of immovable property or of

a real right from enjoying his possession quietly, or which throws any obstacle in the way of that enjoyment.

A disturbance in law is the execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right of ownership or to the possession of immovable property or of a real right therein, or any claim or pretension of ownership or right to the possession thereof except in an action or proceeding, adversely to the possessor of such property or right.

Art. 3660. Same; possession. A person is in possession of immovable property or of a real right, within the intendment of the articles in this Chapter, when he has the corporeal possession thereof, or civil possession thereof preceded by corporeal possession by him or his

ancestors in title, and possesses for himself, whether in good or bad faith, or even as a usurper.

Subject to the provisions of Articles 3656 and 3664, a person who claims the ownership of immovable property or of a real right therein possesses through his lessee, through another who occupies the property or enjoys the right under an agreement with him or his lessee, or through a person who has the use or usufruct thereof to which his right of ownership is subject.

Art. 3661. Same; title not an issue; limited admissibility of evidence of title. In the possessory action, the ownership or title of the parties to the immovable property or real right therein is not at issue.

No evidence of ownership or title to the immovable property or real right

therein shall be admitted except to prove:

(1) The possession thereof by a party as owner;

(2) The extent of the possession thereof by a party; or

(3) The length of time in which a party and his ancestors in title have had possession thereof.

Art. 3662. Same; relief which may be granted successful plaintiff in judgment; appeal. A judgment rendered for the plaintiff in a possessory action shall:

(1) Recognize his right to the possession of the immovable property or real right therein, and restore him to possession thereof if he has been evicted, or maintain him in possession thereof if the disturbance has not been an eviction;

(2) Order the defendant to assert his

adverse claim of ownership of the immovable property or real right therein in a petitory action to be filed within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief; and

(3) Award him the damages to which he is entitled and which he has prayed for.

A suspensive appeal from the judgment rendered in a possessory action may be taken within the delay provided in Article 2123, and a devolutive appeal may be taken from such judgment only within thirty days of the applicable date provided in Article 2087(1)-(3).

APPENDIX H
DECISIONS AND WRITTEN OPINIONS
ALL CIRCUITS 1969 - 1983

Year Ending 6/30:	1969	1970	1971	1972
PUBLISHED STATISTICS*:				
Judgeships	97	97	97	97
Panels	na	na	na	32.3
Actions Terminated After Hearing or Submission:				
Per Panel	na	na	na	264
Per Judgeship	53	63	78	na
Opinions per Judgeship				
Signed	17	22	32	38
Unsigned	30	33	34	36
EXTRAPOLATED STATISTICS:				
Total Opinions per Judgeship	47	55	66	74
Total Terminated After Hearing or Submission:	5141	6111	7566	8527.2
Total Opinions	4559	5335	6402	7178
%-With Opinions	88.68	87.30	84.62	84.18
%-Without Opinions	11.32	12.70	15.38	15.82
	100.00	100.00	100.00	100.00

* Source - Federal Court Management Statistics, 1973-1983, Administrative Office of U. S. Courts.

APPENDIX H, CONT.
DECISIONS AND WRITTEN OPINIONS
ALL CIRCUITS 1969 - 1983

Year Ending 6/30:	1973	1974	1975	1976
PUBLISHED STATISTICS*:				
Judgeships	97	97	97	97
Panels	32.3	32.3	32.3	32.3
Actions Terminated After Hearing or Submission:				
Per Panel	297	261	282	288
Per Judgeship	na	na	na	na
Opinions per Judgeship				
Signed	40	33	24	29
Unsigned	36	33	37	39
EXTRAPOLATED STATISTICS:				
Total Opinions per Judgeship	76	66	61	68
Total Terminated After Hearing or Submission:	9593.1	8430.3	9108.6	9302.4
Total Opinions	7372	6402	5917	6596
%-With Opinions	76.85	75.94	64.96	70.91
%-Without Opinions	23.15	24.06	35.04	29.09
	100.00	100.00	100.00	100.00

* Source - Federal Court Management Statistics, 1973-1983, Administrative Office of U. S. Courts.

APPENDIX H, CONT.
DECISIONS AND WRITTEN OPINIONS
ALL CIRCUITS 1969 - 1983

Year Ending 6/30:	1977	1978	1979	1980
PUBLISHED STATISTICS*:				
Judgeships	97	97	132	132
Panels	32.3	32.3	44	44
Actions Terminated After Hearing or Submission:				
Per Panel	353	274	213	241
Per Judgeship	na	na	na	na
Opinions per Judgeship				
Signed	39	36	27	32
Unsigned	38	34	28	38
EXTRAPOLATED STATISTICS:				
Total Opinions per Judgeship	77	70	55	70
Total Terminated After Hearing or Submission:	11402	8850.2	9372	10604
Total Opinions	7469	6790	7260	9240
%-With Opinions	65.51	76.72	77.46	87.14
%-Without Opinions	34.49	23.28	22.54	12.86
	100.00	100.00	100.00	100.00

* Source - Federal Court Management Statistics, 1973-1983, Administrative Office of U. S. Courts.

APPENDIX H, CONT.
DECISIONS AND WRITTEN OPINIONS
ALL CIRCUITS 1969 - 1983

Year Ending 6/30:	1981	1982	1983
PUBLISHED STATISTICS*:			
Judgeships	132	132	132
Panels	44	44	44
Actions Terminated After Hearing or Submission:			
Per Panel	277	289	300
Per Judgeship	na	na	na
Opinions per Judgeship			
Signed	36	38	42
Unsigned	43	45	43
EXTRAPOLATED STATISTICS:			
Total Opinions per Judgeship	79	83	85
Total Terminated After Hearing or Submission:	12188	12716	13200
Total Opinions	10428	10956	11220
%-With Opinions	85.56	86.16	85.00
%-Without Opinions	14.44	13.84	15.00
	100.00	100.00	100.00

* Source - Federal Court Management Statistics, 1973-1983, Administrative Office of U. S. Courts.

No. 83-1918

Office Supreme Court, U.S
FILED
JUN 11 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT B. EUBANK, PETITIONER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHER
SHAREHOLDERS OF LEE LUMBER COMPANY, LTD.,

VS.

LEE LUMBER COMPANY, LTD.,

Respondent

VS.

INTERNATIONAL PAPER COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, INTERNATIONAL PAPER COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI

DAVID I. GARRETT, JR.
MERWIN M. BRANDON, JR.
Madison, Garrett, Brandon,
Hamaker, Wilson, Tugwell &
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21 pp

QUESTIONS PRESENTED FOR REVIEW

1. Question No. 1 proposed for review by Petitioner is not presented by the factual and legal circumstances in this lawsuit, is inappropriate in this Petition for Certiorari and is quite inapplicable in any consideration of said Petition.

Respondent shows that both Judgments of the District Court below which preceded the Judgment of the Fifth Circuit Court of Appeal, now sought by Petitioner to be reviewed, are replete with findings of fact.

2. Question No. 2 proposed by Petitioner for review, it is respectfully submitted, is misleading and, as presented, inappropriate to his Petition.

Rule 47.6 of the Local Rules of the Fifth Circuit Court of Appeal specifically provides for affirmation of a Judgment of a District Court without opinion, under stipulated circumstances. In the body of his Petition, Petitioner stipulates that he takes no issue with Local Rule 47.6 itself, but with its application below.

3. Question No. 3 proposed by Petitioner for review necessarily assumes and presupposes a contravention of its own Local Rules by the Fifth Circuit Court of Appeal. Such assumption or presupposition on the part of Petitioner must necessarily be based upon his statements that there were no findings of facts below.

Petitioner's statements in this regard are absolutely untrue, not merely erroneous.

4. Question No. 4 proposed by Petitioner for review is not presented by the factual and legal circumstances of this

lawsuit and is also inappropriate and inapplicable to any review of the Judgment of the Fifth Circuit Court of Appeal herein.

The "unprescribed cause of action" alluded to by Petitioner in said Question No. 4 refers to a "cause of action" held by the District Court below to have never existed and, arguendo, to have long ago prescribed, even if it should have ever existed.

5. Respondent respectfully submits that no questions whatsoever are presented in this lawsuit, with regard to Rulings and/or Judgments of either the District Court below, or the Fifth Circuit Court of Appeal, for review by this Honorable Court. Same are on their face eminently correct.

TABLE OF AUTHORITIES

Page

Cases:

L. L. Brewton Lumber Co., Inc. vs. Continental Can Co., Inc., U.S.D.C., W.D. La. No. 14680 (12/11/71), affirmed 480 F.2d 923 (5th Cir. 1972) 2, 3, 12

Lee Lumber Company, Ltd. vs. International Paper Company, 321 So.2d 42 (La.App. 1975), 324 So.2d 423 (La.App. 1976), 345 So.2d 212 (La. App. 1977), 347 So.2d 503 (1977) 3

Houssiere-Latreille Oil Company vs. Jennings-Heywood Oil Syndicate, 38 So. 932 (La. 1905) 11, 12

Statutes:

Federal Rules of Civil Procedure, Rule 12(b)(6) 6
Federal Rules of Civil Procedure, Rules 56 and 56(c) 6
United States Supreme Court Rule 17 .....8, 13
Fifth Circuit Local Rule 47.6 .....7, 8, 9

LIST OF RELATED COMPANIES

In compliance with Rule 28.1, the following List of Related Companies is furnished. International Paper Company is a publically owned, international corporation and has no parent corporation. Rule 28.1 does not require the listing of wholly owned subsidiaries.

NAME	STATE OR COUNTRY OF INCOR-PORATION	PERCENTAGE OF OWNERSHIP
Androscoggin Reservoir Company 150 Main Street Lewiston, ME 04240	Maine	13%
Anthony Forest Products Company 309 No. Washington St. El Dorado, AR	Delaware	46%
Arizona Chemical Company 1600 Route 208 Fair Lawn, NJ 07410	Delaware	50%
Arizona Chemical Overseas Corporation 16-00 Route 208 Fair Lawn, NJ 07410	Delaware	50%
Arizona Chemical Service Corporation c/o CT Corporation System 8751 West Broward Blvd. Plantation, Broward County, FL 33324	Florida	50%

NAME	STATE OR COUNTRY OF INCOR-PORATION	PERCENTAGE OF OWNERSHIP
Calpine Containers, Inc. 1875 Olympic Boulevard Walnut Creek (Contra Costa County) CA 94596	California	32.80%
Calpine Sales, Inc. 1875 Olympic Boulevard Walnut Creek (Contra Costa County) CA 94596	California	32.80%
The Indian River Company 126 State Street Albany, NY 12207	New York	55.8%
Corporacion Forestal De Venezuela, C. A. Manufacturas de Papel, C. A. Apartado Postal 2046 Carmelitas, Caracas, Venezuela	Venezuela	49%
Envases International S. A. Venezuela	Venezuela	51%
IPI Corporation	Japan	51%
Productora de Papeles	Colombia	25%
Rouviere Corporation S.A. Panama	Panama	51%
Sicilcartone S.r.l.	Italy	50%

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STATEMENT OF THE CASE

Respondent submits that the best and most authoritative information regarding the factual situation and circumstances giving rise to this protracted litigation and a most concise documentation of the history of this litigation will be found in the Rulings of the District Court below in Lee II and Lee III (Petitioner's Appendix A, pages A-1 through A-20 and Appendix C, pages C-1 through C-11).

The Ruling in Lee II finds that the pleadings and exhibits therein establish the facts of said lawsuit beyond dispute. The District Court thereupon details the factual situation which it finds to have been established beyond dispute, discusses earlier litigation between the parties in the State Courts of Louisiana, both of original jurisdiction and of appellate jurisdiction, and particularly cites findings of fact, holdings and rulings of the State Courts of Louisiana.

Thereafter, the Ruling in Lee II examines and discusses in great detail and at great length the contentions and claims for relief of Plaintiff therein, Lee Lumber Company, Ltd., setting forth in some detail the Court's analysis of all of the grounds relied upon by Plaintiff therein.

Particularly, the District Court in Lee II specifically covered, discussed and ruled, adversely to Lee Lumber Company, Ltd., upon the very contentions, grounds and claims later made by this Petitioner in Lee III. A brief but careful reading of this Ruling of the District Court below in Lee II will definitively answer in the affirmative the question of whether findings of fact and application of appropriate laws of the State of Louisiana were accomplished by the District Court below in Lee II.

The Ruling of the District Court below in Lee III makes particular reference to its earlier Ruling in Lee II, as well as to earlier stages of litigation between these parties in the Louisiana Courts. This review of the facts and history of the earlier litigation in the Ruling in Lee III prefaced and tied in the actual Ruling of the Court with regard to the allegations and claims of the Complaint of this Petitioner in Lee III.

A brief but careful reading of this ruling of the District Court below in Lee III clearly reflects the findings of fact and application of appropriate Louisiana law thereto.

The Summary Judgments granted by the District Court below in Lee II and in Lee III were clearly judgments on the merits, resulting from an application by a Court of competent jurisdiction of appropriate statutory, codal and/or case law to undisputed factual situations and/or findings of fact made by the Court. Statements to the contrary by Petitioner are, at best, erroneous conceptions of the history of the litigation between the parties, covering a period of more than ten years.

Petitioner discusses from time to time in his Petition the 1971 decision by the same District Court below in *L. L. Brewton Lumber Co., Inc. vs. Continental Can Co., Inc.*, D. C., W.D.La., No. 14680, 480 F.2d 923 (CA 5 1972). Discussion of this decision will be made at points later herein. Suffice it to say at this point that the Court in that case did not have before it the question of prescription. The application of Louisiana law by the District Court below in that case is in no way analogous to the application made by the Court of Louisiana law in either Lee II or Lee III.

In his Petition (pages 8 and 9), Petitioner states that Lee I, brought in the Louisiana Courts, named no particular

cause of action. This statement is untrue (*Lee Lumber Company, Ltd. vs. International Paper Company*, 321 So.2d 42 (La. App. 1975); Ruling Lee II, Petitioner's Appendix A, pages A-1 through 5). Further, Petitioner (page 10) states that the Louisiana District Court, on remand, found that International had breached the Lease Agreement in question every year, but held Lee estopped from canceling. The Louisiana Third Circuit Court of Appeal in fact found that Lee had by its conduct acquiesced in a method or procedure of payment and had waived its right to complain. In effect, the Court found that there had been no breach, because Lee had accepted the alternate method or plan of payment, and could not now complain of breach (*Lee Lumber Company, Ltd. vs. International Paper Company*, 345 So.2d 212 (La. App. 1977); Ruling, Lee II, Petitioner's Appendix A, pages A-5 through 7).

Petitioner states (page 11) that thereafter, "having meanwhile learned" of the *L. L. Brewton Lumber Co., Inc.* decision, Lee filed Lee II in the District Court below. In truth and in fact, said decision was rendered on December 8, 1972 (Petitioner's Appendix F, pages F-1 through F-14). Petitioner, as Counsel for Lee in the lawsuit originally filed before the Louisiana District Court, not only knew of and was thoroughly familiar with said decision, but viewed it as his foundation and basic authority for initially instituting suit in Lee I. However, it is noted that Petitioner, at this same point in the Petition, specifically states and acknowledges that Lee II did recite and allege, among others, the possessory action.

In outlining the history of Lee III, Petitioner states that the District Court below held that the possessory action was stated and had not prescribed. This is not simply an erroneous conclusion, it is a knowingly false statement. The District Court ruled that International is possessing

under a valid Lease Agreement and that, therefore, there being no disturbance, the possessory action, which this Petitioner had affirmed to the District Court as his only cause of action, by personal affidavit filed with the District Court on December 13, 1982, was not a proper action before the Court (Petitioner's Appendix C, pages C-10 and 11).

Finally, Petitioner states that a new lawsuit, styled by him as "Lee IV", was filed in the District Court below, concurrently with his filing in Lee III a Petition for Rehearing in the Fifth Circuit.

As of the date of the original attempt at filing by this Petitioner of these proceedings in this Court, no service of any such lawsuit had been made, or apparently attempted, upon Respondent. During the interim period, following the rejection by this Court of Petitioner's initial filing of his Petition for Certiorari, for failure to comply with Rules of this Court, and the filing by him of the present Petition, and preceding this filing by Respondent, service of process upon Respondent in said lawsuit has been accomplished. It develops that this lawsuit, referred to as "Lee IV" by Petitioner, was in fact filed in the District Court on November 10, 1983, but not served upon Respondent's Louisiana Agent For Service of Process until March 29, 1984, the Notice, signed by Petitioner, being dated March 27, 1984. Under the present Federal Rules of Civil Procedure, Petitioner, as Plaintiff therein, had the responsibility of effecting such service of process. His delay in accomplishing same, a period of more than four months, only highlights and emphasizes the vexatious and harassing manner in which Petitioner has proceeded during the history of this litigation. Suffice it to say that said new lawsuit is simply another attempt by Petitioner to relitigate his lawsuit. Respondent submits that same is entirely without merit.

SUMMARY OF ARGUMENT

Respondent would at the outset submit to this Honorable Court as strongly as possible that it views this Petition for Certiorari as frivolous. Moreover, Respondent has always viewed Lee II as unnecessary, as all claims of Lee Lumber Company, Ltd. had been completely and finally decided in the litigation before the Louisiana Courts. Lee III is viewed as an abuse by this Petitioner of the judicial process and as vexatious and harassing litigation, from Respondent's own standpoint. The filing by this same individual of a fourth lawsuit based upon this original controversy, long ago settled by Louisiana and Federal Courts, as well as the filing in this Court of this Petition for Certiorari, may well justify imposition of sanctions by this Court and the District Court below.

Each of the reasons relied on by Petitioner in seeking a Writ of Certiorari is erroneous and facetious. Each is predicated upon either an erroneous conception or conclusion as to past and present factual and legal circumstances involved in this lawsuit, or is based upon attempts to erroneously apply misconceived legal principles to factual situations which do not exist in this lawsuit.

For the convenience of the Court, Respondent will below treat each of these stated reasons of Petitioner separately, captioned and in the same order as presented in the Petition.

1. *Affirmance on Issue Not Present Below.*

While the caption given Reason No. 1 by Petitioner is somewhat nebulous, he identifies same a bit more thoroughly

(page 19) by his statement that he takes no issue with Local Rule 47.6 itself, but with its application below.

Petitioner states (page 20) that the District Court below granted a Motion to Dismiss for failure to state a claim upon which relief could be granted, under Rule 12(b)(6), FRCP, and that there were no findings of fact in the District Court. These statements are not true.

The District Court below converted Respondent's Motion to Dismiss into a Motion For Summary Judgment, pursuant to Rule 56, FRCP (Petitioner's Appendix C, pages C-1 through C-2 and C-14 and C-15). Rule 56(c) (Petitioner's Appendix G, pages G-5 and G-6) provides for the rendering of a Summary Judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact". The decision by the District Court to convert Respondent's original Motion to one for Summary Judgment, and to grant said Motion, as so converted, necessarily required a finding that all matters of material fact were established by the record as it then existed in this lawsuit. Further, the Court (Petitioner's Appendix C, pages C-8 through C-10) identified the issues with which it was concerned in Lee III, namely, whether there had in fact been a "disturbance" under Louisiana law and, if so, whether this possessory action was brought by Lee, or by Petitioner on its behalf, with a period of one year, dating from the alleged "disturbance", being identified by the Court as the recordation of the Lease by International in 1946.

Directly ruling upon these issues of fact and law (Petitioner's Appendix C, pages 10 and 11), the District Court below held that the Summary Judgment in Lee II was dispositive of the entire claim, the Lease Agreement in question between the parties was not subject to attack and that,

this being the case, International, as Lessee, possessed under a valid Lease Agreement. Therefore, there being no "disturbance", the Court ruled that the possessory action, identified by affidavit by this Petitioner as his only cause of action in Lee III, was not a proper action before the Court in this lawsuit.

It is submitted that the reasoning of the Fifth Circuit in affirming the Summary Judgment granted by the District Court, with specific reference to Local Rule 47.6 is quite apparent. There was not involved in the consideration of the Fifth Circuit any question of the sufficiency of evidence to support a jury verdict, nor a question of an order of an administrative agency. The only other circumstances provided by Local Rule 47.6 as dispositive of a matter submitted to the Court for decision is that in which a Judgment of a District Court is based on findings of fact which are not clearly erroneous. It is most apparent that the Fifth Circuit utilized its prerogatives under Local Rule 47.6 because it found that this circumstance existed and that said Court also determined that no error of law appeared and that an opinion by the Fifth Circuit in this lawsuit would have no precedential value.

2. *Affirmance With No Indication of Grounds.*

In this section of the Petition, Petitioner continues to assert that there were in this lawsuit no findings of fact, at issue or otherwise. Respondent submits that these allegations of Petitioner are untrue, or, at best, quite apparently erroneous.

Seeking to find some basis to attempt to convince this Court to issue a Writ of Certiorari herein in exercise of its supervisory powers, Petitioner sets out that the Fifth Cir-

cuit set both Lee II and Lee III for oral argument and thus, in Petitioner's confused appreciation of the situation, determined that they were not frivolous. This conclusion of Petitioner is misleading.

Respondent submits that oral argument was called for in Lee II for the purpose of providing the Court with an opportunity to have presented by and discussed with Counsel therein for International various points of Louisiana statutory and case law having to do with relative and absolute nullities. One of the Judges sitting on the panel which heard argument in Lee II was from the State of Texas and not familiar with these particular areas of Louisiana law and stated to Counsel for International from the bench that his interest in knowing more about these questions lay behind his desire to have oral argument presented. In Lee III, this Petitioner vigorously sought oral argument and same was granted by the Court.

In his presentation of his Reason No. 2, Petitioner seems to attempt to show or imply that the Fifth Circuit has or may have so departed from the accepted and usual course of judicial proceedings as to provide a reason for this Court to exercise its powers of supervision, under Rule 17 of this Court. Nothing could be further from the true factual and legal situation in this lawsuit.

Argument and observations made hereinabove in connection with Petitioner's Reason No. 1, particularly dealing with the apparent reasoning of the Fifth Circuit in utilizing its Local Rule 47.6, are likewise applicable to Petitioner's Reason No. 2.

3. *Affirmance in Contravention of Local Rules.*

It is submitted once more that Petitioner's position that there were no findings of facts below, "dispositive" or not, is simply untrue.

Reason No. 3 presented by Petitioner is simply another attempt by him to argue an erroneous theory, based upon a factual situation which does not exist in this case.

Argument and observations made hereinabove in connection with Petitioner's Reasons Nos. 1 and 2, particularly dealing with the apparent reasoning of the Fifth Circuit in utilizing its Local Rule 47.6, are likewise applicable to Petitioner's Reason No. 3. No action taken or procedure followed by the Fifth Circuit in this lawsuit can possibly imply or be viewed as a contravention of its Local Rules. On the contrary, adherance by the Fifth Circuit to its Local Rule 47.6 is quite apparent from the record.

4. *Judgment Dismissing For Prescription of One Action, As Bar to Later Suit on Another Action.*

Petitioner makes the statement that the District Court below held in Lee III that his Complaint therein asserted a possessory cause of action which had not prescribed. He further states that the District Court therein applied the doctrine of res judicata, although it found a distinction between the cause of action expressed in Lee II and that expressed in Lee III.

These statements are false. They are not simply erroneous conclusions, they are false statements. These statements cannot conceivably be implied as holdings of the District Court in Lee III, as will be apparent from a record of the proceedings in this matter in the District Court,

particularly the Ruling of February 3, 1983 of Honorable Nauman S. Scott, United States District Judge (Petitioner's Appendix C, pages C-1 through C-11). Petitioner attempts to establish a false factual situation and then proceeds to attempt to apply thereto erroneous interpretations of codal, statutory and case law. Petitioner attempted this same approach and pursued these same erroneous theories and arguments in his appeal to and argument before the Fifth Circuit below.

The District Court, in Lee III, in granting Summary Judgment in favor of International Paper Company, found in fact that the possessory action had been one of the causes of action urged by Lee Lumber Company, Ltd. in Lee II, that same had been disposed of by the earlier Summary Judgment granted therein and that this Petitioner could not relitigate same in this lawsuit, Lee III (Petitioner's Appendix C, page C-6, footnote 6 and page C-10, footnote 10). Further, the District Court reiterated that the Lease between the parties was valid, having been held not subject to attack, and that, as International held the property in question under a valid Lease, the possessory action would not lie herein, there being no "disturbance" in fact or in law. The District Court below had no occasion or need to pass upon the question of prescription of the possessory action, as it found that no possessory action ever existed between these parties.

However, the District Court below did note in passing that, "arguendo", even if the Lease Agreement had been void, any possessory action would necessarily have had to have been brought within a period of one year following the alleged "disturbance", identified in the Complaint herein and by the Court as the filing in 1946 of the Lease Agreement between the parties. (Petitioner's Appendix C, page C-8 and page C-11, footnote 11).

The identity of actions requisite for the application of res judicata is quite apparent in this lawsuit. The District Court below found and ruled quite clearly that the possessory action had been one of the actions urged in and presented by Lee II and that the Summary Judgment granted International in Lee II was dispositive of the entire claim therein (Petitioner's Appendix C, pages C-5 and C-6, footnote 6 and page C-10). The satisfaction of the requisite of identity of the parties is so obvious herein as to obviate need for argument. Petitioner brought this lawsuit in the District Court below as a Shareholder's Derivative Action, not as his own individual right, but as a right of and on behalf of Lee, without question the Plaintiff in Lee II. There can be no question that International in Lee III is the same party as the Defendant in Lee II. The identity of the thing demanded in this lawsuit as one of the same things demanded in Lee II is also readily apparent. It cannot be said that there is any question as to the competency and jurisdictional authority of all Courts previously and presently involved in the history of this litigation. As to the finality of the Summary Judgment granted in Lee II, the record herein reflects and Petitioner admits that an appeal thereof was taken to the Fifth Circuit Court of Appeal, which affirmed the decision of the District Court therein, under date of May 15, 1980 (Petitioner's Appendix B, pages B-1 and B-2).

Petitioner seeks to mislead this Honorable Court as to the history and holdings of *Houssiere-Latreille vs. Jennings-Heywood Oil Syndicate*, 38 So. 932 (La. 1905). A careful and complete review of *Houssiere-Latreille* shows that same affirmed the decision of the lower Court, by virtue of the original Opinion of the Louisiana Supreme Court, and that, although a rehearing was had before the Louisiana Supreme Court, said rehearing also resulted in affirmation and did

not reverse the Opinion of said Court as its original hearing. Said decision of the Louisiana Supreme Court has never been overruled or reversed. Statements made by Petitioner at pages 15 and 16, footnote 15 of the Petition are untrue and thoroughly misleading. The law of *Houssiere-Latreille,* as applicable to this present lawsuit, is quite properly applied by the District Court in its Ruling in Lee III (Petitioner's Appendix C, pages C-9 and C-10).

Petitioner further alludes to the *L. L. Brewton Lumber Co.* case, supra, continuing, as he has for more than ten years, both as Counsel for Lee in Lee I and Lee II and as Plaintiff in Lee III and Petitioner herein, to conveniently disregard the obvious fact that no question of prescription was ever raised or ever entered into the consideration of the Court in that case. The District Court below did not reach a "contrary conclusion" in either Lee II or Lee III. Application by the Court of Louisiana laws of liberative prescription went to the heart of the matters in Lee II and Lee III.

From a reading of the various Rulings and Judgments of the District Court and Fifth Circuit below, in Lee II and in Lee III, it will be readily seen that the illustrative scenario visualized by Petitioner at pages 39 through 41 of his Petition for Certiorari is at very best completely and hopelessly erroneous.

CONCLUSION

A review on the Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The character of reasons which will be considered by this Court is set forth in its Rule 17.

It is respectfully submitted that no reasons have been shown in these proceedings to support this request by Petitioner for the issuance by this Court of a Writ of Certiorari.

Respondent submits that the Petition for Certiorari is entirely without merit and respectfully requests that same be denied.

All of the above and foregoing is thus respectfully submitted.

David I. Garrett, Jr.
A Professional Law Corporation

Merwin M. Brandon, Jr.
A Professional Law Corporation

MADISON, GARRETT, BRANDON, HAMAKER, WILSON, TUGWELL & RHYMES
1406 Royal Avenue
Monroe, Louisiana 71207

Attorneys For Respondent

CERTIFICATE OF SERVICE

I, Merwin M. Brandon, Jr., one of the attorneys for International Paper Company, Respondent in these proceedings, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 8th day of June, 1984, copies of this Opposition to the Petition for Certiorari, with included or accompanying brief and argument, were mailed in duly addressed envelopes, with postage prepaid, to:

Robert B. Eubank
Petitioner
Suite 203
15 Office Park Circle
Birmingham, Alabama 35223

Richard L. Crowell
Crowell, Owens & Tudor
Counsel for Lee Lumber Company, Ltd.
P.O. Box 330
Guaranty Bank & Trust Company Building
Alexandria, Louisiana 71309

I further certify that all parties required to be served have been served.

Merwin M. Brandon, Jr. m.m.b.j.

Merwin M. Brandon, Jr.

Office - Supreme Court, U.S.
FILED
JUN 25 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1918

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT B. EUBANK, PETITIONER
INDIVIDUALLY AND ON BEHALF OF ALL OTHER
SHAREHOLDERS OF LEE LUMBER COMPANY, LTD.

VS.

LEE LUMBER COMPANY, LTD., RESPONDENT

VS.

INTERNATIONAL PAPER COMPANY, RESPONDENT

RESPONSE OF PETITIONER, ROBERT B. EUBANK, TO MOTION FOR DAMAGES OF RESPONDENT INTERNATIONAL PAPER COMPANY

ROBERT B. EUBANK
Attorney at Law
Suite 203
15 Office Park Circle
Birmingham, Alabama 35253
Telephone: (205) 324-9217

MAY IT PLEASE THE COURT:

Respondent International Paper Company, ("International"), on June 8, 1984 moved to impose $50,000 damages against petitioner under Rule 49.2, arguing that the instant petition for certiorari is "frivolous." Petitioner received the motion June 11, 1984. International's motion, and brief in opposition to the petition, show substantial agreement as to what occurred below, and that the petition is not frivolous.

The questions for review fall into two broad categories, substantive and procedural.

The Substantive Question. The substantive issue is whether the Lee II decision, dismissing that suit for prescription of the "action of nullity or rescission," is res judicata to the instant Lee III action stating the "possessory" cause of action.

The parties seem to agree:

> (1) That, unless all of Lee's causes of action are barred by prescription of the "action of nullity or rescission" (or by res judicata, i.e., a prior dismissal of an entire claim solely for prescription of the "action of nullity or rescission"), the Lease in question is void. International draws no distinction between a previous, affirmed decision of the District Court below, L. L. Brewton Lumber Co. v. Continental Can Co., Inc., D.C., W.D.La., No. 14680, 480 F.2d 923 (5th Cir. 1972), which voided a lease with the same consideration as the present Lease, and this case, save to assume that in Brewton the issue of prescription must not have been raised. International's Brief, pp. 2, 12.
>
> (2) That Lee I, the original suit to cancel the Lease, was dismissed in the Louisiana courts solely on prescription of the "action of nullity or rescission" (i.e., as to the issue whether the Lease is void; another issue, whether it had been breached by International, was tried and lost by Lee).
>
> (3) that Lee II was dismissed by the District Court below solely for prescription of the cause of action of "nullity or rescission," although Lee II specifically attempted to state a "possessory" cause of action and several others;
>
> (4) that Lee III specifically confined itself to asserting the possessory cause of action, and that it was dismissed solely on the grounds that Lee II was res judicata.

As Justice Holmes said, on many points of law "a page of history is worth a volume of logic." Before the Federal Rules of Civil Procedure adopted the unified, single form of civil action in 1938, no one doubted that the prescription of one cause of action - e.g., "nullity or rescission" - did not bar the bringing of another - e.g., a "possessory action". Statutes of limitations bar only their recited "causes of action", not lawsuits in

general.

Nor did anyone doubt, in 1938, that the Federal Rules did not change this. Adoption of a single form of civil action meant merely that causes of action need not be specifically pleaded, not that the prescription of one cause of action arising from a given set of facts now barred any other cause of action present therein. If before 1938 the prescription of the "action of nullity or rescission" did not bar the "possessory action," or other available causes of action, it did not after 1938 either.

Similarly, before 1938 a judgment rendered solely upon one cause of action, was not res judicata to the subsequent bringing of another. Under writ pleading, a prior adverse judgment on one cause of action (e.g., that it did not lie, had prescribed, or that there was a valid defense to it) did not bar the subsequent bringing of another. The penalty for choosing an unviable cause of action from among several available, was delay of justice until a viable cause of action was pursued - not denial of justice forever. In short, there was no compulsory joinder of causes of action. The 1938 Federal Rules did not change this either. The single form of action merely meant that, if the identity of the cause of action became crucial, a plaintiff should be free to argue the existence of any cause of action supported by the facts pleaded. It did not mean that a judgment dismissing a claim in which there lay several causes of action, solely on the grounds of the prescription of (or unavailablity of, or existence of a defense to) one cause of action, was res judicata to subsequent other causes of action.

Since 1938, cause-of-action issues have been, mercifully, of less frequency and importance. But they are still central to the issues of prescription and res judicata.

Although the United States Supreme Court has not recently entertained a petition for certiorari on a similar question of res judicata, the Fifth Circuit has. See **Nilsen v. City of Moss Point, Mississippi**, 701 F.2d 556 (5th Cir. 1983) (en banc). Issues which occasion en banc appellate hearings are not

frivolous for certiorari.

The Procedural Questions. The procedural questions, the first three, ask essentially whether the Fifth Circuit properly affirmed without opinion under Local Rule 47.6.

Both parties agree that Local Rule 47.6 requires that the affirmed judgment be "based on findings of fact which are not clearly erroneous; that the instant judgment was upon a motion to dismiss, converted to a motion for summary judgment under Rule 56, FRCP; and that under Rule 56(c) summary judgment issues only where "there is no genuine issue as to any material fact." International's Brief, page 6.

If there was "no genuine issue as to any material fact" below, how could the District Court judgment have been based "on findings of fact," clearly erroneous or not? How could this have been the "dispositive" issue on appeal, so as to invoke Local Rule 47.6?

International sees factual issues in whether International's acts were a "disturbance" under Louisiana law, and whether the action had prescribed. These are issues of law, not of fact. There is no factual dispute as to what International's acts were upon the subject property, or as to when the suit below was brought.

The Supreme Court has twice granted petitions for certiorari on decisions by Court of Appeals below without grounds or opinions, and remanded to the courts below for an opinion stating grounds. Taylor v. McKeithen, 407 U.S. 191, 32 L.Ed.2d 648, 92 S.Ct. 1980 (1972); Northcross v. Board of Education, 412 U.S. 427, 37 L.Ed.2d 48, 93 S.Ct. 2201 (1973). This petition is to obtain review of almost the same question as was involved in Taylor and Northcross. Here, either the grounds for decision were lack of clear error in (non-existent) findings of fact below - a non sequitur - or else the grounds are not revealed. The petition is not frivolous, and should in fact be granted.

International, urging that the petition is frivolous, relies heavily on the "ten years" of prior "litigation" over the matter.

But prior litigation does not mean frivolity. Every case for which a petition is filed has been both tried and appealed at least once. And the "ten years" of "litigation" between International and Lee might better be described as ten years of "non-litigation." It amounts to three dismissals, the first two grounded solely upon prescription of a cause of action not urged ("nullity or rescission"), and the present upon res judicata, even though it states a different cause of action ("possessory action") than that held stated before. Issues of prescription and res judicata are prone to give rise to repeated non-litigation. See **Nilsen** (supra), the last in a series of four civil actions.

The issues raised are important not only to the present parties but also to the administration of justice in general; the maintenance of a balance between the need to cope with the modern "flood of litigation" and the need for open, reasoned, scholarly and professional disposition of cases by the Courts of Appeals. International is not alone in feeling "harassed" or displeased by the erratic course of the matter. Petitioner does also, and Lee, and (one suspects) so also do the District Court and the Court of Appeals for the Fifth Circuit. Disposition with neither opinion nor grounds has been a service neither to the litigants nor the courts.

Accordingly International's motion should be overruled.

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CERTIFICATE OF SERVICE

I, do hereby certify that on the _____day of June, 1984, copies of the Response to the Motion of Damages, were mailed in duly addressed envelopes, with postage prepaid, to:

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I further certify that all parties required to be served have been served.

Robert B. Eubank